CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]370

W. S. WEBB AND JACOB GOLDBAUM

vs.

THE UNITED STATES OF AMERICA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED FEBRUARY 23, 1918.

(26,350)

(26,350)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 883.

W. S. WEBB AND JACOB GOLDBAUM

vs.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Filed Feb. 11, 1918. Wm. C. Cochran, Clerk.

1 United States Circuit Court of Appeals, Sixth Circuit.

No. 3068.

W. S. WEBB and JACOB GOLDBAUM, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Submitted January 10, 1918, Certified February 11, 1918.

Before Warrington and Denison, Circuit Judges, and Sessions, District Judge.

PER CURIAM:

Having concluded that the controlling question herein is one that must be certified to the Supreme Court, we proceed to state our conclusions of fact and law which lead to this necessity.

Plaintiffs in error complain of judgment and sentence against them under the first count of an indictment charging that they conspired contrary to §37 of the Penal Code, to violate the Act of December 17, 1914 (38 St. p. 78; U. S. Comp. St. §6287*g*),—known as the Harrison Anti-Narcotic Law. They claim that the indictment should have been quashed or that verdict should have been directed in their favor.

The indictment is most inartificial; but we conclude that it sufficiently supports a prosecution based upon the theory that both respondents intended to have Goldbaum violate the law by using the order blanks for a prohibited purpose. Upon no other theory can we find it charged that both respondents intended any act which is both described in the indictment and which may be a violation of the Harrison Act. This theory, as applied to the facts hereafter cited, brings us to the double quesion whether the law should be so construed as to reach and punish Goldbaum's conduct; and, if so, whether such construction makes the act unconstitutional.

Goldbaum was in the business of selling at retail, and to the users thereof, drugs, including morphine. Such sales were
2 lawful, prior to the passage of this Act, and they continued to be lawful, except as therein forbidden. The clause in the latter part of §2 Prohibited Goldbaum from using the statutory order forms to get morphine for any purpose other than the sale by

him in the conduct of a lawful business by him in such drugs. Taking the hereafter stated sale to Rabens as typical, the question is whether this sale, otherwise lawful, was forbidden by any part of the act. If so, it was by the broad prohibitory language of the first part of §2. Applying this language to the Rabens case (and unless this purchase was within the exception *b*), it is declared to be unlawful for Goldbaum to sell morphine to Rabens unless Rabens produces therefor a blank order form; and since these order forms can only be furnished to registered dealers and can be used by no one else, and since Rabens was not of that class, it follows that sales by Goldbaum to the ordinary retail purchaser are absolutely forbidden, unless made on the physician's prescription of exception (*b*).

In United States v. Jin Fuey Moy, 241 U. S. 394, it was held that although the general language of §8 prohibited possession of morphine by any unregistered person and although exceptions found in the body of that section indicated that the inhibition of the section was intended to reach persons who could not register (because it excepted some persons who could not register), yet, taking the whole act together and considering the danger to the validity of the whole act resulting from the natural construction of §8 considered alone, it must be considered that the prohibition extended only to those who could register. By analogy, it is now urged that although the prohibition in the early part of §2 against selling to any person not provided with a blank order is universal in form, and although other parts of this section indicate that it was intended to reach persons who could not get order forms (for it in effect declared that it did not except the ordinary retail purchaser unless he had a physician's certificate) yet the prohibition should, upon the whole, be construed as extending only to those persons who were by law allowed to procure order blanks; and that the contrary construction would make the act unconstitutional,—since the prohibition of sales by a retailer, who has registered under the law and paid his full tax, has no reasonable relation to the raising of revenue. In the latter connection, it is also urged that, since the law can not rest upon any police power in Congress, if the sale of these drugs may be prohibited by regulation appurtenant to a dealer's tax of a dollar
3 a year, then Congress may prohibit the sale of liquor except upon a physician's prescription, or of shoes, except upon a bureau certificate. On the other hand, the great public benefit of this regulation, to be made by the competent legislature, is obvious, the law has been generally enforced for three years according to the government's present contention, and the Supreme Court, with clear opportunity to hold generally that the sale prohibitions were unconstitutional, refrained from so doing.

If section 2, rightly construed, forbids sales to a non-registrable user, and if such prohibition is constitutional, we next meet the question whether such orders as Webb gave to applicants are "prescriptions," within the meaning of exception (*b*) in section 2.

We conclude that the case can not be disposed of without determining the construction and perhaps the constitutionality of the law in certain particulars, and for the purpose of certification, we state the

facts as follows,—assuming, as for this purpose we must do, that whatever the evidence tended to show in aid of the prosecution, must be taken as a fact:

Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these "prescriptions," not after consideration of the applicant's individual case, and in such quantities and with such directions as, in his judgment, would tend to cure the habit or as might be necessary or helpful in an attempt to break the habit, but without such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by §1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by §2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers, in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over 4,000 such perscriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name.

4

Upon these facts, we desire the instruction of the Supreme Court for our proper decision of the following questions of law arising thereon:

1. Does the first sentence of §2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who can not obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (*b*) of section 2?

If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two become immaterial.

J W. WARRINGTON,
A. C. DENISON,
C. W. SESSIONS,
Judges of the Circuit Court of Appeals of the Sixth Circuit, sitting in this cause.

5 United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing certificate and statement of facts in the case of W. S. Webb and Jacob Goldbaum, Plaintiffs in Error vs. United States of America, Defendant in Error, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 12th day of February, A. D. 1918.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 26,350. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 883. W. S. Webb and Jacob Goldbaum, vs. The United States of America. (Certificate.) Filed February 23d, 1918. File No. 26,350.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB and JACOB GOLDBAUM,

vs. **No. 883**

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT OF W. S. WEBB AND JACOB GOLDBAUM.

RALPH DAVIS,
Attorney for Webb and Goldbaum.

TOOF-MEMPHIS

In the Supreme Court of the United States

OCTOBER TERM, 1918.

W. S. WEBB and JACOB GOLDBAUM,

vs. No. 883

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT OF W. S. WEBB AND JACOB GOLDBAUM.

STATEMENT OF CASE.

Webb and Goldbaum were convicted in the District Court of the United States for the Western District (Western Division) of Tennessee of a conspiracy to commit an offense against the United States, to-wit, to violate the "Harrison Narcotic Act," in violation of Section 37 of the Criminal Code. The facts may be succinctly stated as follows:

Webb was a practicing physician and Goldbaum

a retail druggist. Both were duly registered and had paid the tax as required by the provisions of the Act. It was Webb's custom to prescribe morphine to habitual users upon their application to him therefor. Goldbaum was familiar with this practice and constantly filled the prescriptions. Goldbaum was provided with the blank forms contemplated by Section 2 of the act and by use thereof had obtained copious quantities of morphine from wholesale dealers. It was agreed and understood by Webb and Goldbaum that the latter should, by the use of these forms, procure a stock of morphine, which he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of both that morphine should be thus furnished by Goldbaum to habitual users thereof, but without any physician's prescription issued in the course of a "good faith" attempt to cure the morphine habit.

A writ of error to the judgment of conviction was sued out from the Circuit Court of Appeals for the Sixth Circut, which has certified to this Court the following questions:

1. "Does the first sentence of Section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who

can not obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. "If the answer to Question 1 is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. "If a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being used for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of Section 2?"

ARGUMENT.

In the indictment in the District Court, Webb and Goldbaum were charged with conspiring to violate a public law of the United States, namely, the Harrison Narcotic Law, and the alleged acts of commission averred by pleader in indictment were based upon the following clause in Section 2 of said act: "It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

The first sentence of Section 2 of the Harrison Narcotic Act is as follows: "That it shall be unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs, except in pursuance of a written order of the person to whom said article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue."

It is the contention of the writer that where a druggist registers, pays the tax and obtains a narcotic drug on a form provided by the Commissioner of Internal Revenue (these being prerequisites for a druggist to dispense and distribute narcotic drugs)

that he has a right to dispense directly to the consumer without a physician's prescription; that that part of the Harrison Narcotic Law inhibiting a druggist from dispensing narcotic drugs except upon a physician's prescription, is a violation of a police regulation, which the Congress has no power to establish, the act to that extent being an invasion of the reserved power to local regulation inherent in the State governments and in violation of the Constitution of the United States.

Amendment to the Constitution, Article 10, provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

In construing this article, your Honorable Court has repeatedly held "that the power of the States to regulate matters of internal police within their limits applies not only to the health, morals and safety of the public, but also to whatever promotes the public peace, comfort and convenience." Boston R. R. Co. v. Mass., 97 U. S. 25, also authorities cited in paragraph 10, Notes of Decisions U. S. Compiled Statutes Annotated, 1916, Vol. 11, p. 14419. This reserved police power retained in the States has reference to the practice of medicine, etc. See Meffert v. Packer, et al., 195 U. S. 625.

In the case of U. S. v. Jin Fuey Moy, 201 U. S. 394, the Harrison Narcotic Law was held to be a revenue measure. In the case of In re Kollock, supra, 165 U. S. 526, Chief Justice Fuller expressed himself as follows:

> "The act before us is on its face an act for levying taxes and, although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. * * The oleomargarine legislation does not differ in character from this (laws relating to distilled spirits and tobacco) and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue, protection to purchasers in getting the real and not a spurious article, cannot be held to be the primary object in either instance and the identification of dealer, substance, quantity, etc., by marking and branding, must be regarded as means to effectuate the objects of the act in respect of revenue."

In the case at bar in testing the constitutionality of the question suggested, the controlling factor, as declared by Justice Fuller, applied to the certified questions, that is, "whether or not the retail sale of morphine by a druggist to persons who have no physician's prescription, who have no order blank

therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued," and, second, "if a practicing and registered physician issues an order for morphine to a habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use," should be, are these regulations and restrictions to be regarded as "means to effect the objects of the act in respect of its revenue?

Would the doing of either of the acts in certified questions be such acts of commission or omission as could be styled offenses against the laws of the United States? Applying the test prescribed by Justice Fuller, would the sale of morphine by a druggist to a person who has no physician's prescription, who has no order form and who cannot obtain an order form because not of the class to which such blanks or forms are allowed to be issued, be regarded as a means to effect the object of the act in respect of its revenue?

In a recent case in the United States Circuit Court of Appeals for the Seventh Circuit, when identically the same questions as the certified questions in the case at bar were considered by the Court (Blunt v.

U. S. of America), Justice Mack, delivering the opinion of the Court, said:

> "If an act is in fact a revenue law, it is beyond the province of the courts to inquire into its wisdom, justice or efficiency the motives that led to its enactment, or its incidental effect as a police measure. The regulation of private morals, the suppression of frauds upon the public, or the protection of industry that may result from a revenue law, will not change its character or invalidate it, if it be otherwise constitutional. McCray v. U. S., 195 U. S. 27. And in the exercise of a power granted to it, whether it be that of taxation as in Felsenheld v. U. S., 186 U. S. 126, sustaining the constitutionality of the italicised section of the clause of the Dingle Tariff Act (copied as foot note) 2, or that of regulating commerce as in Hoke v. U. S., 227 U. S. 308, sustaining the constitutionality of the White Slave Traffic Act, of June 25, 1910, C. 395 (36 Stat. 825), or in Hipolite Egg Co. v. U. S., 220 U. S. 45, sustaining the constitutionality of the Pure Food Act (34 Stat. 768), Congress may adopt 'not only means necessary but convenient to its exercise and the means may have the quality of police regulations.'
>
> "And in the Felsenheld case, it was held to be within the power of Congress, to keep the package of tobacco to which a stamp was affixed to indicate payment of the Federal tax on the tobacco, free from extraneous articles, such as prize or premium coupons, because, as Justice

> Brewer said, the Government has the 'power to prescribe that the package which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed.' "

And again:

> "This, however, is the sole purpose and intent of the last clause in Section 2. No question of tax or revenue or the protection or security thereof is involved; under this clause, it is declared unlawful for a physician who has paid the required license fee and has bought the order form essential to obtain the drug, to consume it himself as a drug addict or to give it away or to sell it except in the legitimate exercise of his profession. In our judgment, this prohibition has no relation whatsoever to the taxing power of Congress; it is exclusively an attempt, in the guise of an incidental tax regulation, to exercise the police powers reserved to the State."

The main purpose of the act is to provide for a tax and enforce its collection, for the legitimate sale or disposal of opium and its derivatives. Any regulation, law or provision that aids in the enforcement or collection of this tax is within the rights of Congress. A consideration of the whole Act and of the many regulations of the Treasury Department governing the sale and control of the drug leads to the conclusion that greater efforts are made in the

measure to protect against the misuse of the drug than to its enforcement as a revenue act.

This reasoning applies more forcibly to the third query. There, the regulations requiring the drug to be dispensed by a physician only in the course of professional practice, after having duly registered and paid the tax, can only be a police measure looking primarily to the protection of the public against the abuse of this drug, not remotely serving as an aid, the means to effect the object of the Act in respect of its revenue. Are these regulations to be considered as incidental or as means to enforce the collection of the revenue?

In the case of Mugler v. Kansas, 123 U. S. 623-661, referring to the so-called Prohibition Statute of Kansas attacked as unconstitutional as being in effect a confiscation of property under the pretense of protecting the public morals, health and safety, says:

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of courts to so adjudge, and thereby give effect to the Constitution."

Applying this rule of construction, it would seem to be the court's duty to see that the real purpose of the Act as a revenue measure should be carried into effect, but that those provisions of the act regulating and restricting traffic in the drug should be confined to their incidental functions, "as means to effect the object of the act in respect of its revenue," and to that extent strictly construed.

The sale of morphine to a person not made in pursuance of that person's written order, as required by the statute, the sale "not in the regular course of professional practice," the fact that the one to whom the sale is made is known as a "dope fiend," does not tender to render effectual the collection of the revenue tax imposed by the act. To extend the incidental moral objects of the taxing measure by a liberal construction would be to unfairly and without certain right encroach upon the state's sovereign powers.

The Harrison Narcotic Law is not a police measure. The relationship of the Federal Government to the traffic in narcotic drugs or in anything else is limited to the exercise of the taxing power and to interstate commerce transactions.

In view of the foregoing, the writer contends that Query One should be answered in the affirmative and

that this construction makes unconstitutional the prohibition of such sale.

Respectfully submitted,

RALPH DAVIS,
Attorney for Webb and Goldbaum.